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Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
State of Florida,

Petitioner,

v.

FREDDIE LEE HALL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. When a state habeas prisoner through his counsel affirmatively and objectively declines to offer available evidence pertaining to a constitutional claim in a state court proceeding and a federal court of appeals agrees that there is sufficient evidence to support a district court finding of deliberate bypass, may the Court of Appeals consistently with Murch v. Mottram, 409 U.S. 41 (1972) and Rule 52(a) Federal Rules of Civil Procedure, nevertheless require a further evidentiary hearing on the deliberate bypass issue.

II. Is the defendant's presence during a portion of trial in a capital case so required by the Fourteenth Amendment to the Constitution that it may not be waived by the defendant or his counsel either by specific conduct of the accused, the decision of counsel, or merely the failure to interpose a contemporaneous objection at trial and to assert the error on appeal; and if the issue can be waived, did the Court of Appeals err in refusing to consider the applicability of Wainwright v. Sykes, 433 U.S. 72 (1977)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, Eleventh Circuit, is reported at 733 F.2d 766 (11th Cir. 1984) and appears in the Appendix at A 1 - 94. That court's order entered on November 30, 1984 denying the Petition for Rehearing and Petition for Rehearing En Banc appears in the Appendix as A 95 - 97. The opinion of the United States District Court is reported at 565 F.Supp. 1222 (1983) and appears in the Appendix at A 98 - 206. The district court's order denying Hall's rehearing petition appears at A 207 - 230. Two relevant opinions of the Supreme Court of Florida are reported as Hall v. State, 403 So.2d 1321 (Fla. 1981) and Hall v. State, 420 So.2d 872 (Fla. 1982).

JURISDICTIONAL STATEMENT

The decision of the Eleventh Circuit Court of Appeals was entered on May 16, 1984. A Petition for Rehearing and Suggestion for Rehearing En Banc were timely filed and denied on November 30, 1984.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1234(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Freddie Lee Hall, along with an accomplice Mack Ruffin, kidnapped Karol Lea Hurst, transported the victim to a remote area where she was raped, beaten and murdered. (A 2 - 3) Hall was convicted of first degree murder and sentenced to death The Florida Supreme Court affirmed the judgment and sentence. Hall v. State, 403 So.2d 1321 (Fla. 1981). Thereafter, the governor signed Hall's death warrant and the date of execution was set for October 6, 1982. A motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 was filed on September 28, 1982 by Hall's collateral counsel Mr. Lockett. The motion contained some twenty-six claims for relief comprising about sixty pages in length. The trial court conducted a hearing on September 30,

1982. At that hearing Hall's collateral counsel declined for tactical reasons to call trial counsel who were present and available in court to explain their conduct with respect to numerous cited examples of their alleged ineffectiveness. (A 37, fn. 14; A 189 - 191, A 220, A 222 - 223). Hall's collateral counsel declined the opportunity to present evidence despite having discussed the case with trial counsel and after an opportunity was given for further consultation and for depositions. The trial court denied relief on all the claims presented, either on substantive or procedural grounds.

The Florida Supreme Court affirmed the denial of post-conviction relief. Hall v. State, 420 So.2d 872 (fla. 1982). The Court initially opined that most of the issues were or could have been raised

on direct appeal and as a consequence would not support a collateral attack. But some points merited discussion. As to a claim that Hall was not present during some of the jury selection, the court found that Hall was present at all critical stages of the proceedings and available to consult with counsel. 420 So.2d at 873. The court also found that the ineffective counsel claim failed. The Court noted Hall's refusal to question available witnesses, "to let a cold record speak for itself" (420 So.2d at 874) and found nothing in the record which would support a claim of ineffective assistance of counsel.

Hall next sought relief in the federal district court. The district court granted a stay of execution pending the outcome in the Eleventh Circuit of the

subsequently decided en banc ruling in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983). (A 114) Seven months later Distict Judge Susan Black denied relief on all twenty-six claims. (A 98 - 206) On August 18, 1983 she entered another order denying Hall's rehearing petition. (A 207 - 230)

As to the absence in the court issue Judge Black recognized that the issue had not been raised on direct appeal in the state court but reached the merits since the Florida Supreme Court had discussed it on the jury selection aspect. Judge Black deferred to the state court finding that Hall was present during the actual voir dire and selection of the jury. (A 184) The district court agreed that Hall was present and able to consult with counsel at all critical stages, noted that counsel

had agreed to the jurors' move in Hall's absence (A 185, 231 - 233) and concluded there was no constitutional infirmity under Howard v. Kentucky, 200 U.S. 164 (1906). Hall's other alleged absences were found not to jeopardize his right to due process nor result in injury to his substantial rights. (A 185)

As to the ineffective counsel claim the district court found that Hall's collateral counsel choice not to put on available evidence in state court "for tactical reasons" to be a deliberate bypass or inexcusable neglect, (A 190 - 191, 221 - 223) but the district court did not stop there. In addition, the court reviewed the record and decided, alternatively, that Hall's ineffective counsel claim was without merit. (A 192 - 202; 226) The court rejected as unsound Hall's

claim that the time was insufficient for him to prepare; the allegations in the petition were lengthy and specific and counsel was able to refer to specific portions of the record. (A 224 - 227)

The Court of Appeals' treatment of the issues contrasted sharply with that of the district court. On the absence from the courtroom issue, the majority noted a concern about Hall's absence during the trial court's discussion with the jury concerning items of evidence and the effect of _roffitt v. Wainwright, 685 F.2d 1227, 1256 - 1258, modified on rehearing, 706 F.2d 311. The majority read Proffitt to hold that a defendant may not waive his presence at any critical stage of his trial. (A 35) Accordingly, the majority felt it desirable to remand for further development of the circumstances

surrounding Hall's absence during the communications with the jury, what the security reason was causing Hall's absence at one time[1] and whether the absence was at a non-critical stage and, therefore, harmless. (A 35 - 36)

In a concurring and scholarly opinion Judge Hill noted first that all the alleged absences except at jury selection should be barred under Wainwright v. Sykes, 433 U.S. 72 (1977). (A 55 - 57); opined that the majority ignored the modification in the Proffitt rehearing opinion (A 59 - 60) and concluded:

> "Of course, we must consider whether the panel's original conclusion that the defendant cannot waive his presence was correct; but I believe, upon

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[1] The court made no reference to the trial court's explanation provided at A 231 - 233.

> examining the governing case law, that the panel probably reached the wrong result in their intial opinion." (A 60)

After a lengthy analysis of Supreme Court precedents Judge Hill concluded that presence in a capital case is waivable (A 60 - 80), that most of the alleged absences were capable of resolution on the instant record and were harmless and that a remand was appropriate only for the absence prior to the jury selection. (A 80 - 94)

The court below acknowledged that the statement of counsel at the state court collateral hearing[2] was sufficient evidence for the district court to conclude there had been a deliberate bypass but the presence of other statements suggesting otherwise, thought the court, required an

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2 "I choose to [not put on any testimony] as a matter of tactics at this time."

evidentiary hearing. (A 37)

Incredibly, the Court of Appeals also ruled that the district court because of its deliberate bypass conclusion:

> " . . . never ruled on the merits of Hall's ineffective assistance of counsel allegations." (A 47)

Thus, the Court thought that on remand if the district court concluded that Hall did not deliberately bypass his state remedies there must be a hearing on the ineffective counsel claim. (A 47)

The Court of Appeals declined to correct or clarify its decision in denying rehearing. (A 95 - 97)

REASONS FOR GRANTING THE WRIT

The instant petition presents an important question which this Court has not previously directly addressed and that is whether a federal court of appeals may require a federal district court to conduct an evidentiary hearing on the issue of whether a state habeas prisoner deliberately bypassed his available state remedies when the district court has made a factual finding of such a bypass on the basis of the state court record and when the Court of Appeals admits there is sufficient evidence in the record to support such a finding. Because the lower court's ruling is inconsistent at least implicitly with prior decisions of this Court and because the effect of the Court of Appeals' ruling would subvert the promotion of the values of comity and federalism sought to

be advanced by the Congress in enacting 28 U.S.C. §2254(d), it is important that this Court immediately respond to the lower court ruling.

Essentially, the facts are susceptible to an easy summary. The Florida Supreme Court affirmed the judgment and sentence of death imposed on Freddie Lee Hall, on his direct appeal on July 16, 1981. Hall v. State, 403 So.2d 1321 (Fla. 1981). On September 9, 1982 the Governor signed his death warrant effective for the week of October 1 through October 8. Collateral counsel filed a lengthy (sixty pages covering twenty-six claims) Motion to Vacate pursuant to Florida Rule of Criminal Procedure 3.850. At the state court evidentiary hearing conducted on September 30, 1982, collateral counsel refused to present evidence supporting the assertions that trial counsel were ineffective

although new counsel had conferred with trial counsel and they were present in the courtroom, available to testify. Collateral counsel Mr. Lockett stated that he decided not to put on evidence "as a matter of tactics."[3] The trial court and the Florida Supreme Court honored counsel's decision to let a cold record speak for itself and relief was denied. Hall v. State, 420 So.2d 872, at 874 (Fla. 1982). On September 30, 1982, Hall filed his habeas corpus petition in the United States District Court and a stay was entered pending a decision in Ford v. Strickland (A 114 - 115) Seven months later District Judge Susan Black ruled inter alia, that the state court record clearly demonstrated a deliberate bypass

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[3] Lockett repeatedly stated he chose not to present evidence, App. B, pp. 488, 527, 536, 539. (A 220)

of a state remedy in counsel's choice not to present evidence for tactical reasons. (A 189 - 191) This finding was reasserted in her subsequent order denying rehearing. (A 222 - 226)

The Court of Appeals acknowledged there was "sufficient evidence" to support this finding of a deliberate bypass (A 37) but opined that a federal evidentiary hearing was required because other statements in the record might suggest there was not a bypass.

As far back as 1963 in Townsend v. Sain, 372 U.S. 293 (1963) this Court recognized that a federal hearing was compelled if evidence crucial to adequate consideration of the claim was not developed at the state hearing "for any reason not attributable to the inexcusable neglect" of the petitioner 372 U.S. at 317.

In Henry v. Mississippi, 379 U.S. 443 (1965) this Court acknowledged that defense counsel's deliberate choice of strategy would amount to a waiver binding on a habeas petitioner precluding him from a decision on the merits. 379 U.S. at 451.

28 U.S.C. §2254, the federal habeas corpus statute, requires that a state prisoner complaining about a state court judgment shall not be granted relief "unless it appears that the applicant has exhausted the remedies available in the courts of the state." 28 U.S.C. §2254(b). And under subsection (d) state court factual findings made after a full and fair hearing "shall be presumed to be correct" unless the applicant establishes by convincing evidence that the factual determination was erroneous. See also Sumner v. Mata, 449 U.S. 539 (1981)

In Murch v. Mottram, 409 U.S. 41 (1972) this Court rejected the notion that a prisoner would be permitted to objectively manifest in a state court hearing an intention not to pursue a constitutional claim and subsequently assert his contrary subjective desire:

> "In this sensitive and oft times strained area of federal-state relations, a state prisoner may not deliberately 'elect' not to comply with the interpretation of the state procedural statute by the state court, and then assert in federal court that no rights were waived because he did not have the subjective intent to waive his constitutional claims.
>
> (409 U.S. at 46)

In a series of cases this Court has recognized the valid interests in promoting policies which insure that at some point in time there will be an end to litigation and that federal appellate court fact-finding is not superior to that of

the state courts. Sumner v. Mata, 449 U.S. 539, at 550 fn. 3 (1981); Smith v. Phillips, 455 U.S. 209 (1982); Marshall v. Lomberger, 451 U.S. 422 (1982); Maggio v. Fulford, __ U.S. __, 76 L.Ed.2d 794 (1983); Wainwright v. Goode, __ U.S. __, 78 L.Ed.2d 187 (1983); Patton v. Yount, __ U.S. __, 81 L.Ed.2d 847 (1984). Similarly, it has been recognized that Rule 52(a) of the Federal Rules of Civil Procedure allocates to the district court the initial and primary role of fact finder; the district court determination is not to be set aside unless it is clearly erroneous. Pulman-Standard v. Swint, 456 U.S. 273 (1982). This does not mean that an appellate court may simply assign greater weight to certain findings rather than others. Inwood Laboratories v. Ives Laboratories, 456 U.S. 844 (1982).

Marching to the beat of a different drummer the Court of Appeals adopts an approach seemingly designed to expand the number of unnecessary hearings in the federal district court and to exacerbate the tensions between the state and federal judicial systems. Now in 1984 (by true Orwellian logic) the Court of Appeals turns the law on its head and urges more federal evidentiary hearings, after acknowledging that the state record contains sufficient evidence supporting the district court conclusions and invites the habeas prisoner and his counsel (contrary to Murch) to tell us he didn't mean what he said so that he can successfully elect the federal over the state forum for consideration of his claims in derogation of

28 U.S.C. §2254.[4] It is understandable that a habeas applicant might hope that his chances for success are improved if his meritless claims are considered by a federal judge unfamiliar with the case rather than the state judge before whom he was tried and convicted; it is understandable that a habeas applicant might not prefer that factual resolutions made by a state judge be binding in federal court. But a habeas applicant's desire in this regard is foreclosed by the congressional policy underlying 28 U.S.C. §2254. What

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[4] If the district court rejects the self-serving declaration of the habeas applicant's team (we didn't really mean to deliberately bypass - we were kidding about making a tactical choice) will the Court of Appeals again second guess the district court on credibility determinations? If so, why do we bother with the district court? Much time can be saved by the Court of Appeals acting as both fact-finder and reviewer.

is not understandable is the lower court's willingness to ignore the foregoing policies and precedents of this Court to promote the unsound view that justice can be achieved only be requiring evidentiary hearings in the federal district court.

The decision of the lower court ignored Murch v. Mottram;[4a] instead it cited, and misapplied prior circuit decisions regarding the need for an evidentiary hearing on bypass. It misapplied Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983) and Buckelew v. United States, 575 F.2d 515 (5th Cir. 1978) because both decisions permit a finding of bypass without an evidentiary hearing:

[4a] Despite consistent reliance by the petitioner Wainwright on Murch in both the district court and Court of Appeals.

> " . . . as when the trial transcript reveals an express waiver of the issue by defense counsel."

697 F.2d at 988; 575 F.2d at 519

Since the Court of Appeals agreed that defense counsel had declared at the state court hearing that he was choosing his course for tactical reasons and that there was sufficient evidence for the district court's factual finding of a bypass (A 37) no further hearing is required. To permit the habeas applicant now to submit evidence that he didn't mean it subverts Murch and the process of habeas review envisioned by the Congress in enacting 28 U.S.C. §2254.

Petitioner wishes to emphasize to this Court that others, including federal appellate judges, have expessed concern over the direction of the lower court in

requiring unnecessary evidentiary hearing. In Thomas concurring Judge Fay felt bound by the precedent of Guice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981) but agreed with the dissent in that case, adding:

> Unfortunately we are trying to accommodate and reconcile conflicting authorities. It seems to me that the principles of comity and federalism are paramount and straightforward. Federal courts should not be required to hold hearings nor be asked to grant relief based upon evidentiary material which has never been presented to the state courts when the state courts afford procedures by which the evidence could have been considered.
>
> (697 F.2d at 989)

Attempting to adhere to prior circuit decisions is a commendable venture for appellate judges; more praiseworthy is to apply Supreme Court decisions in lieu of erroneous Circuit rulings.

This court has previously instructed inferior federal courts that they are bound by its decisions. As stated in Hutto v. Davis, 450 U.S. 370, 374 - 375 (1982):

> More importantly, however, the court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Member of this Court decide cases "by virtue of their commissions, not their competence." And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from Rummell. But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.

The lower court ignored the requirement of Rule 52(a) to accept district court factual findings not clearly erroneous.

After acknowledging that there was sufficient evidence to support the district court's finding of a bypass (A 37) the appellate court opined that other statements suggested that counsel refused to put on evidence because of time constraints occasioned by his recent efforts during the pendency of a death warrant. Significantly, an identical "time constraints" argument was submitted and rejected in Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983) (see J. Kravitch's concurring opinon at p. 1547: "appellant claims that the state evidentiary hearing was not full and fair and therefore an evidentiary hearing was required on this issue in the federal district court.") This Court too subsequently rejected the ploy. In Antone v. Dugger, __ U.S. __, 79 L.Ed.2d 147 (1984) the Court stated:

> ". . . applicant urged that these claims be reconsidered, as the press of time during the first set of collateral proceedings had denied his counsel a 'full and fair opportunity' to develop the claims in the state and federal courts."
>
> (79 L.Ed.2d at 151)

This court confirmed the lower court determination of an abuse of the writ. As stated in footnote 4:

> "Applicant contends nonetheless that he could not have been expected to present these claims in his first federal habeas petition, as his present counsel was appointed when execution was imminent and therefore did not have time fully to familiarize himself with the case. This contention is not new, has been rejected by the courts below, and is meritless."
>
> (79 L.Ed.2d at 153)

Certiorari should be granted to end Eleventh Circuit inconsistency. Antone

claimed his state court hearing was not fair because his lawyer was unprepared with execution imminent; the contention was rejected summarily by the federal courts and Antone was executed. Hall makes a similar assertion and even though the record reflects counsel's tactically choosing not to present available evidence the Court of Appeals demands more evidence be heard.[5]

If a habeas prisoner and his counsel can so easily manipulate the system to select the forum for presentation of his claim, either by not presenting available evidence at the state court proceeding or by putting on a portion of their case as a dry run to determine the state's response,

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5 The District Court also found that counsel had ample opportunity to present evidence in state court. (A 220 - 226)

as a rehearsal in preparation for an opening night performance in the federal district court, 28 U.S.C. §2254(d) might as well be repealed and Sumner and its progeny discarded. If the lower court's frenzied belief that only evidentiary hearings in the federal courts suffice under the Constitution the only response available to the states is to eliminate all state post-conviction procedures and permit the federal judiciary to pre-empt the area. Justice will not improve for the reasons outlined in Mr. Justice Stevens' concurrence in Jackson v. Virginia, 443 U.S. 307, 326 - 339 (1979).

Because the decision of the lower court constitutes a retreat from so many precedents of this Court, the petition should be granted and summary reversal is appropriate.

The second question presented is important; it presents a recurring issue in capital litigation yielding unclear and inconsistent doctrines by the lower court. Petitioner submits that a defendant may waive his presence during a capital trial either personally or through his counsel, and that the waiver may be effectuated positively by specific affirmation or simply by the failure to interpose a timely contemporaneous objection in the trial court and reassertion of the objection on appeal.

The confusion in the lower court is manifest merely by a review of the concurring opinion of Judge Hill at A 55 - 94.

The majority purports to rely on the prior decision of Proffitt v. Wainwright, 685 F.2d 122 (11th Cir. 1983) modified on rehearing, 706 F.2d 311 (11th Cir. 1983),

cert. denied, __ U.S. __, 78 L.Ed.2d 697.

The original panel opinion of Proffitt decided:

> "Until the Court expressly overrules its decisions in Diaz and Hopt, however, we are bound by the rule established in those cases that a capital defendant's right to presence is nonwaiveable."
>
> 685 F.2d at 1258

On rehearing Judge Kravitch moderated that view:

> "We need not decide the issue of whether presence at a capital trial ever is waivable, however, for here, even if we assume that the right to presence in capital case may be waived, no knowing and voluntary, and therefore, no effective waiver was made . . . hence appellant did not knowingly or voluntarilywaive his right to presence.
>
> (706 F.2d at 312)

In the instant case, the majority seems to have resurrected the Proffitt panel

presence is non-waivable doctrine[6] and ignored the rehearing modification that presence may be waivable if knowing and voluntary (A 35 - 35; 58 - 60). Judge Hill noted the inconsistency and concluded:

> " . . . I believe upon examining the governing case law, that the panel probably reached the wrong result in their initial opinion."

(A 60)

The panel which sat on Proffitt was a different one than sat on Hall; the Court of Appeals declined to clarify via the mechanism of rehearing or rehearing en banc whether the law in the Circuit is or

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6 "We read Proffitt to hold that a defendant may not waive his presence at any critical stage of his trial." (A 35)

would be that presence is nonwaivable or waivable if knowing and voluntary. (A 96) The States of Florida, Georgia and Alabama should not be required to guess at the requirements mandated by the Court of Appeals in some future case on whether an accused or his counsel may decide to be absent.

Moreover, as Judge Hill's concurrence points out (A 58 - 80) this Court's earlier decisions of Diaz v. United States, 223 U.S. 442 (1912) and Hopt v. Utah, 110 U.S. 574 (1884) relied on by the Proffitt court are not valid authority for the proposition that waiver at a capital trial is unwaivable. Diaz involved the construction of a Philippine statute dealing with the right of a defendant to be present in a non-capital case and the Court held the accused could waive his presence. Any

comments therein about capital cases were total dicta. Hopt v. Utah dealt with the interpretation of a statute from the Territory of Utah requiring the presence of the defendant and this Court has repeatedly commented that the language regarding presence in the courtroom was dicta. Snyder v. Massachusetts, 291 US 97 (1934); Frank v. Mangum, 237 U.S. 309 (1915); Illinois v. Allen, 397 U.S. 337 (1930)

In Snyder, Justice Cardoza noted that what was said in Hopt on the subject of the defendant's presence " . . . was dictum and no more." 291 US. at 117, fn.2 Elsewhere, he stated:

> "Nowhere in the decisions of this Court is there a dictum and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow. What has been said, if not decided is distinctly to the contrary.

> Howard v. Kentucky, 200 U.S. 164, 175, 50 L.Ed 421, 426, 26 S.Ct. 189 . . . "

(291 U.S. at 106 - 107)

In Frank, another capital case, this Court upheld a judgment and sentence where the defendant was not present in the courtroom, his presence being waived by counsel without his knowledge or consent. The Court rejected a contention that Diaz prohibited the imposition of such a judgment. 237 U.S. at 238 - 241. Even dissenting Justice Holmes acknowledged that:

> ". . . we never have been impressed by the argument that the presence of the prisoner was required by the Constitution."

(237 U.S. at 346)

In Illinois v. Allen, the Court repeated that the Hopt dicta that a trial cannot continue in the defendant's absence

had been expressly rejected in Snyder. 397 U.S. at 342.

In another case Howard v. Kentucky, 200 U.S. 164 (1906) this Court held that the due process clause was not violated when the accused was not present (his counsel having waived it) at a voir dire examination of a prospective juror's prejudice.

In the instant case the Court of Appeals cited seven instances in which Hall was allegedly absent.[7] (A 32 - 33) The issue was not presented to the state appellate court on direct appeal as required

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[7] (1) the general qualification of jurors; (2) a discussion on various legal motions; (3) his counsel's stipulation to the excusal of an alternate juror; (4) the marking for identification of an exhibit; (5) the release of the remaining alternate jurors at the end of the guilt phase; (6) the trial court's discussion with the jury concerning their request for certain items of evidence during deliberation; and (7) the trial judge's dismissal of the jury.

by state law. (A 132) Hall first urged the contention in a motion for postconviction relief. In affirming the denial of relief the Florida Supreme Court first reasserted its enforcement of procedural default policy.

> "The majority of issues raised in the motion of the remaining issues could have been raised there. They are, therefore not matters which will support a collateral attack. Adams v. State, 380 So.2d 423 (Fla. 1980); Sullivan v. State, 372 So.2d 938 (Fla. 1979). Several fo the points raised, however, merit discussion."

(Hall v. State, 420 So.2d 872, at 873)

The Court then briefly discussed and rejected Hall's contention that his absence during the initial general qualification of prospective jurors. None of the other challenged absences were mentioned. The federal Court of Appeals paid no heed to the state's contention that the

failure to raise the claim on direct appeal constituted a Wainwright v. Sykes, 433 U.S. 72 (1977) procedural default precluding habeas review. see also Ford v. Srickland, 696 F.2d 804 (11th Cir. 1983); Forman v. Smith, 633 F.2d 634 (2nd Cir. 1980). The state also urged that the state courts' discussion of Hall's alleged absence during jury selection was an alternative holding which did not constitute an abandonment of the state's procedural default enforcement policy. See United States ex rel Caruso v. Zelinsky, 689 F.2d 435 (3rd Cir. 1982).

While the majority below did not address the procedural default issue on this point (A 32 - 36), specially concurring Judge Hill agreed that the alleged absences other than at jury selection were barred by Sykes (A 55 - 57) and that no

further hearing was needed to determine the lack of merit or harmlessness on these other alleged absences. (A 85 - 94).

The most recent decisions of this Court (as well as the earlier decisions of Snyder, Frank and Howard, supra) emphasize the vital role played by trial counsel in the criminal justice system. In Faretta v. California, 422 US. 806, at 820 - 821 (1975) the Court declared:

> "It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decision of trial strategy in many areas . . . This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative."

Chief Justice Burger, concurring in Sykes, supra, wrote:

> "Once counsel is appointed the day to day conduct of the defense rests with the attorney. He, not the client, has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client."

(433 U.S. at 93)

If indeed trial counsel is entrusted with the vast array of decision making there is no reason why such decisions should not also include whether or not the accused is present at a given portion of the trial.

This Court should now take the opportunity to hold that presence during a capital trial may be waived by the defendant or his competent counsel and that Hall's failure to raise this claim on appeal as required by state law constitutes

a Sykes waiver precluding federal habeas consideration.

Rule 17.1(a), Rules of the Supreme Court, announces that one of the reasons the Court may consider for the grant of certiorari review is whether the lower court decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The lower court deviated from its own precedents, and its approach sharply contrasts with that of other courts in their attempt to faithfully and constructively apply recent habeas corpus jurisprudence. Consider the following examples.

Item 1 - The lower court opines that an evidentiary hearing may be helpful to address Hall's claim that trial counsel's ineffectiveness may constitute "cause"

under Sykes excusing the failure to timely raise certain claims. (A 47 - 48) Other circuits have held that alleged ineffectiveness does not constitute cause. Indiviglio v. United States, 612 F.2d 624 (2nd Cir. 1979), cert. den. 445 U.S. 933; Jones v. Jago, 701 F.2d 45 (6th Cir. 1983), cert. den. __ U.S. __, 78 L.Ed.2d 255. The Fifth and Eleventh Circuits have held at least up to now, that alleged ineffectiveness of counsel of counsel does not constitute cause under Sykes. See 'umpkin v. Ricketts, 551 F.2d 680 (5th Cir. 1977); Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981); Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981); Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983). In Engle v. Isaac, 456 U.S. 107 (1982), this Court opined that where the basis of a constitutional claim is

arguable and others have litigated the claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default. 456 U.S. at 134.

Item 2 - The Court of Appeals declares:

> "Because it held that Hall had deliberately by-passed state opportunities to present the claim, the district court never ruled on the merits of Hall's ineffective assistance of counsel allegations."
>
> (emphasis supplied) (A 47)

This is a half-truth. District Judge Black did decide there was a deliberate bypass but in addition denied the ineffective counsel claim on the merits and repeatedly stated so. (A 139, fn. 6; A 192 - 205; A 219; A 226). Direct quotes from the record are instructive:

> "The Court considered these claims on their merits in ruling

> on the habeas petition." (A 216)
>
> * * *
>
> " . . . petitioner's allegations of ineffective assistance of counsel are such that the court was able to determine the merits of petitioner's allegations from the existing record." (A 226)

The Court of Appeals' convenient erasure of the record in the frenzied desire to have a federal evidentiary hearing demeans District Judge Black who was at least as diligent as the Court of Appeals in reviewing Hall's petition and disposing of his multiple claims. The lower court's refusal even to credit the district court's effort to evaluate the habeas applicant's constitutional claim is an invitation to judicial anarchy. It is chilling testimony of the extent to which the lower court departs from the precedents in imposing its view requiring unnecessary

evidentiary hearings. This Court in Strickland v. Washington, __ U.S. __, 80 L.Ed.2d 674, 702 (1984) demonstrated that evidentiary hearings are not always required for ineffective counsel claims ("the state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing"). The Eleventh and Fifth Circuits previously had acknowledged the same principle. Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983) (Kravitch, concurring),[8] Winfrey v. Maggio, 664 F.2d 550 (54th Cir. 1981); Schultz v. Wainwright, 701 F.2d 900 (11th Cir. 1983). The inexplicable refusal of the Court of Appeals to review District Judge Black's rulings on the merits

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8 Antone was executed without ever having an evidentiary hearing in federal court.

of the ineffective counsel issue requires this Court's supervisory review. If the lower court meant to announce the rule that an evidentiary hearing is always required on ineffective counsel claims, the rule conflicts with Strickland v. Washington. If the lower court was of the view that the district court's merit analysis was erroneous in some regard the parties and the district court are entitled to an explanation for the rejection of her conclusion.

Item 3 - Repeatedly, the federal courts of appeals have been instructed that state court findings of fact with fair support in the record must be accorded deference. Sumner v. Mata, 449 U.S. 539 (1981); Wainwright v. Goode, __ U.S. __, 78 L.Ed.2d 187 (1983). Similarly, federal district court factual findings

must be accepted unless clearly erroneous. Pulman-Standard v. Swint, 456 U.S. 273 (1892). Yet, in the instant case, the state courts make factual findings concerning trial counsel's performance and respondent's failure to offer supporting evidence which are adopted by the distict court (A 194 - 195) and such findings are ignored by the Court of Appeals. This court should reiterate that the lower courts may not simply apply decisions of which they approve. Hutto v. Davis, supra.

At a time when this court has been emphasizing a primary role of the state judiciary in resolving federal constitutional claims[9] and has been

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[9] See, e.g. Stone v. Powell, 428 U.S. 465 (1976); Sumner v Mata, 449 U.S 539 (1981); Patton v. Yount, __, U.S. __, 81 L.Ed.2d 847 (1984).

unsympathetic to efforts demonstrating an abuse of the writ,[10] the lower court urges exacerbation of tension between the state and federal courts. Finality is secondary to the primary goal of conducting federal evidentiary hearings. Contrast the different philosophies between the Fifth and Eleventh Circuits. In Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) the Fifth Circuit held that a habeas petitioner on a second petition could not urge personal ignorance of a claim to justify its omission in an earlier proceeding when awareness of that claim could be chargeable to his counsel. In the Eleventh Circuit, however, the court in the instant case (and in Thomas v. Zant, 697 F.2d 977) authorizes a habeas prisoner to present no

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[10] Antone v. Dugger, __ U.S. __, 79 L.Ed.2d 147 (1984).

or little evidence of a claim about which he has full knowledge in the state court and then select the federal tribunal for its consideration. Why a claim not pursued by counsel will result in an abuse of the writ finding in the Fifth Circuit and counsel's tactic not to pursue evidence may result in subsequent consideration of the claim by the Eleventh Circuit remains unexplained. A tactic condoned in Atlanta is condemned in New Orleans. Certainly, the dispositon of habeas corpus claims requires greater rationality and consistency. Only this Court can provide it.

CONCLUSION

By ordering a remand to the district court for additonal fact-finding, the lower court needlesly wastes scarce judicial resources. Acknowledging that the record suffices to support the district court finding of a deliberate bypass or inexcusable neglect the Court of Appeals "bypasses" Murch v. Mottram, supra, to permit a habeas applicant to assert he did not mean what was said. The state courts and federal district court make factual findings on the merits of the ineffective counsel claim and the Court of Appeals fantasizes that the merits were not addressed. Precedents of this Court suggesting that absence from the courtroom is not fatal go unheeded and the lower court cannot consistently apply its own prior rulings.

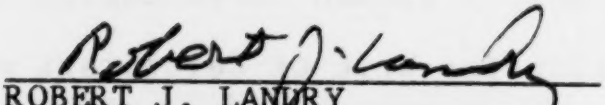
While many voices echo the refrain that the federal judiciary has too much work, the tune is a hollow one when the inferior courts create make-work for themselves. The state judiciary also works with overcrowded dockets and can better use their time than simply conduct what are regarded as "mock hearings" or rehearsals for their federal counterparts. If the principles of comity and federalism promoted by 28 U.S.C. §2254(d) are so easily subject to manipulation and reduced to a cipher at the option of the habeas petitioner, if forum shopping for consideration of constitutional claims is to be the new rule, if adherence to circuit decisions by the lower courts is more important than acceptance of this Court's decisions, then perhaps this petition should be denied. But it should be remembered

that states are not required to provide any post-trial collateral remedies to prisoners; the authority that created the state Rule 3.850 motion to vacate can as well repeal it. If it is thought that the four hundred or so federal judges are overburdened now, conducting all evidentiary hearings for habeas applicants will not improve their lot, nor yield better justice we suggest. One remedy is simply to increase the number of federal judges; the better proposal is to accept the rulings of District Judge Black and to reject the lower court's attempt to circumvent Congressional policy and this Court's decisions.

Certiorari should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, ROBERT J. LANDRY, Counsel for Petitioner, and a member of the Bar of the United States Supreme Court, hereby certify that on the 29th day of January, 1985, I served three copies of the Petition for Writ of Certiorari on Edward S. Stafman, P. O. Box 11112, Tallahassee, Florida 32302, by a duly addressed envelope with postage prepaid.

Robert J. Landry

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